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PICKETING BY LABOR UNION UNLAWFUL IN ABSENCE OF STRIKE

The New York Law Journal for October 27, 1926, published the opinion rendered by the Appellate Division of the Circuit Court of New York in the case of Daitch and Company v. Cohen, which holds that picketing, although peaceable is legally unjustified in the absence of a strike. In this case it appeared that the plaintiff, a private corporation, had never conducted a union shop. It had no employees who were members of the defendant Labor Union. Defendant, for forty-five days picketed plaintiff's shops, the pickets carrying signs, with the purpose of either forcing plaintiff to employ union men or to ruin its business. The Court issued an injunction declaring that, "there being no strike there is no legal justification for the acts of the defendant."

We make further use of a note prepared by the New York Law Journal concerning this subject.

In the case of a strike on the part of employees, by the weight of authority they are entitled to picket, provided, however, (1) that the picketing is orderly and peaceable, and (2) that the number of pickets is reasonable and does not constitute a nuisance or menace. While there is some authority which holds that all picketing tends to incite disorder and riots, and therefore is unlawful per se, as has been said, the weight of authority does not go to that extent. The opinion of Mr. Chief Justice Taft in American Steel Foundries v. Tri-City Central Trades Council (237 U. S., 184), though recognizing the right to picket in connection with a strike, points out that there must be a limitation upon the number and nature of pickets employed, and limited the number of pickets to one representative for each point of ingress and egress (see also Berg Auto Trunk & Specialty Co., Inc., v. Wiener, 200 N. Y. Supp., 745, per Benedict, J.). That picketing is unlawful where coercion, intimidation and physical violence were employed was enunciated by the Court of Appeals in Auburn Draying Co. v. Wardell (227 N. Y., 1). See also Altman v. Schlesinger (204 App. Div., 513, per Clarke, P. J.). In the case of Reed Co. v. Whiteman (238 N. Y., 545, memo., modifying 206 App. Div., 672) the picketing was limited to two in number at any one time, and the injunction issued by the Appellate Division, which in effect restrained all picketing, was declared to be "too broad."

On the other hand, where there is *no strike* at all in the premises of the complainant, and its employees are satisfied and the defendant union is merely acting for purposes of its own in order to arouse discontent, picketing is unlawful and the interference with plaintiff's business by it or by similar means is illegal (Stuyvesant Lunch & Bakery Corp'n v. Reiner, 110 Misc., 357, per Greenbaum, J., aff'd without opinion, 192 App. Div., 951; Arnheim v. Hillman, 198 App. Div., 88; Skolny v. Hillman, 114 Misc., 571, a'ffd 198 App. Div., 941).

In the recent case of Bolivian Panama Hat Co. v. Finkelstein (215 N. Y. Supp., 399) it was held, in a well-considered opinion written at Special Term, New York County, that a labor union may not interfere with a private business for its own purposes where there is no strike, either by picketing or by any other similar coercive measures.

The last cited case was approved editorially in the New York Law Journal on August 17, 1926, and its point of view was adopted at Special Term of the Su-

preme Court, New York County, in the case of The Tailored Woman v. Sigman (supra; see also Cushman's Sons, Inc., v. Amalgamated Food Workers' Bakers, Local 164, et al., 127 Misc. Rep., 152, 215 N. Y. Supp., 401).

It seems clear to us that it is a cardinal and fundamental principle of law that an employer may conduct his own business as he sees fit, so long as he does not infringe upon the rights of others. If, therefore, he determines that his own interests will best be served by the employment of non-union laborers the law should and will protect him equally with those who operate union shops (Yablonowitz v. Korn, 205 App. Div., 440, 199 N. Y. Supp., 769). The Supreme Court of the United States, in the case of Hitchman Coal & Coke Co. v. Mitchell (245 U. S., 229) stated at page 257—and the language is quoted with approval by the learned Appellate Division in the case under discussion—as follows:

"Another fundamental error in defendant's position consists in the assumption that all measures that may be resorted to are lawful if they are 'peaceable'—that is, if they stop short of physical violence or coercion through fear of it. In our opinion any violation of plaintiff's legal rights contrived by defendants for the purpose of inflicting damage or having that as its necessary effect is as plainly inhibited by the law as if it involved a breach of the peace."

While labor should and will be encouraged, yet in the absence of a strike, picketing, the carrying of signs and the distribution of circulars of the character alleged in proceedings of this nature must be deemed unlawful as an improper interference with the legal rights of another, and therefore "as plainly inhibited by the law as if it involved a breach of the peace" (Hitchman Coal & Coke Co. v. Mitchell, supra), since, obviously, acts of this nature are indulged in "simply for the purpose of intimidating and coercing plaintiff to hire union men" (Yablonowitz v. Korn, supra).

NOTES OF IMPORTANT DECISIONS

CAUSE NOT REMOVABLE AFTER FINAL DEFAULT JUDGMENT IN STATE COURT.—The case of State ex rel. v. Kelley, 286 S. W. 724, decided by the Springfield Court of Appeals (Missouri), holds that under federal statute requiring petition for removal of cause to be filed before trial, where default judgment which was final under state procedure was entered in state court before petition for removal was filed in federal court, cause was not removable, regardless of federal court's order for its removal, and, after setting aside of default judgment by state court, it was still pending therein, preventing issuance of writ of prohibition to prevent state court's trying cause.

In this respect the Court said:

"In this case there can be no question but the order of removal made by the federal court on February 19, 1926, was void for the reason that the case was clearly not removable at that time. The federal statute requires the petition for removal to be filed before trial, and the federal courts hold that a default is a trial within the terms of the statute. If the petition is not filed before the trial of the case in the state court, the case is not removable. In this case a default judgment, which, under our procedure was, in this case, a final judgment, was entered in the state court February 18th, one day before the petition for removal was filed in the federal court. It is clear that, had the petition filed in the federal court disclosed that fact, the federal court would not have issued an order of removal. The fact which would show that the case was not removable, to wit, the default judgment in the state court, was apparent on the record of that court, and we see no reason why the state court could not take cognizance of its own record and determine from it that the case was not removable and hence that the order of removal of the federal court, evidently made without knowledge of the fact that a default judgment had already been entered of record in the state court was void.

"It is not a question of the state court overruling or going contrary to the action or judgment of the federal court, but is merely the state court acting on information furnished by the record of the case which was not before the federal court, and which did not require the exercise of judgment or discretion to determine its effect. If it did require the exercise of judgment, the state court could not override the judgment of the federal court, but, when it is apparent from the record of the state court that the case is not removable, the state court can ignore the void order of re-

moval made by the federal court and may proceed in the case as if no order of removal had been made by that court. To our minds the power in a state court to pass upon the question of the sufficiency of a petition to state facts to show that a case is removable would logically carry with it the power to inspect its own record, and, when it is apparent from a mere inspection of that record that the cause is not then removable because forbidden by the plain terms of the statute, that court would not lose jurisdiction by a party filing therein a petition for removal and bond that were regular on their face. The state court, having jurisdiction to pass on the sufficiency of the petition, must necessarily have the power to inspect its own record and determine from it whether the petition had been filed in time and if, as in this case, it is apparent from the record of the court that the case is not removable because the petition was not filed before trial, the state court could disregard the petition, although sufficient on its face, and proceed with the cause.

"On the same principle, the state court could ignore an order of removal made by the federal court when an inspection of its own record shows that the case was not removable when the order of removal was issued by the federal court, for it would then be apparent that the order of removal of the federal court was made without any knowledge of the fact that a trial of the case had already been had in the state court, and the order of removal was for that reason void. We think the reasoning of the United States Supreme Court in Stone v. South Carolina, 117 U. S. 430, 6 S. Ct. 799, 29 L. Ed. 962; supports this view, and we hold that the order of removal made by the federal court on February 19, 1926, was void and did not take away from the state court the power and jurisdiction to set aside a default judgment during the term at which it was entered. We think the order of the court setting aside the default judgment made on February 23, 1926, and during the same term at which it was entered, was within its jurisdiction, and the cause is now pending for trial in that court.

There is another view of this case from which the same result must be reached. If we accept relators' position as correct and hold that the state court was ousted of all jurisdiction by the order of removal made by the federal court on February 19, 1926, because the state court could not pass upon the validity of that order, then we would also be compelled to hold that the state court could not pass on the question as to whether the first petition, filed February 8th, was filed in time. That petition and bond were in due form, and, if the rule that the mere filing of a petition ousts the jurisdiction of the state court and places it in the federal court applied in this case, then the jurisdiction of the state court was arrested on February 8th, when the first petition for removal was filed, and relator would be compelled to go to the federal court and get the case remanded to the state court before the state court could take any other steps. If jurisdiction was lodged absolutely in the federal court by the filing of the petition, then only the federal court could pass on the question as to whether the petition was filed in time. If that were true, then the state circuit court did not have jurisdiction to enter judgment by default, and the judgment it did enter on February 18th, and which is made the basis of this proceeding, is void, and the case is still pending in that court for trial."

EMPLOYEE BLASTING ROCK FOR USE ON RAILROAD NOT ENGAGED IN INTERSTATE COMMERCE.—The Supreme Court of Utah, in Conway v. Southern Pac. Co., 248 Pac. 115, holds that an employee injured while blasting rock from employer's quarry, 10 or 15 miles from where it was used to fill up employer's railroad track, used in interstate commerce, was not engaged in such commerce, within federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665).

In part, the court said:

"Here the employee was engaged in blasting and breaking down rock from a ledge of rock in a mountain, from the respondent's quarry. After the rock was broken down, it by others was loaded into cars and carried a distance of 10 or 15 miles, as we deduce from the allegations of the complaint, and was there used to fill up and raise the track across the lake. On its facts we think the case comes within the case of Delaware, L. & W. R. R. Co. v. Yurkonis, 238 U. S. 439, 35 Sup. Ct. 902, where the employee was preparing and setting off a charge of dynamite for the purpose of blasting coal in the carrier's colliery or mine, and where the court said:

" 'The averments of the complaint as to the manner of the receiving of the injury by plaintiff show conclusively that it did not occur in interstate commerce. The mere fact that the coal may be or was intended to be used in the conduct of interstate commerce, after the same was mined and transported, did not make the injury one received by the plaintiff while he was engaged in interstate commerce. The injury happening when plaintiff was preparing to mine coal was not an injury happening in interstate commerce, and the defendant was not then carrying on interstate commerce, facts

essential to recovery under the Employers' Liability Act.'

"This case also directly comes within the case of McLeod v. So. Pac. Co., 299 Fed. 616, where the employee was engaged in mining rock from the carrier's quarry, intended to be used in repairing its line of railway used in interstate commerce. The court said:

"'A fair interpretation of the allegations of plaintiff's petition is that, at the time of the injury to plaintiff, he was engaged in mining rock intended to be used in the repair or improvement of defendant's roadbed. This was not an interstate commerce service, nor so closely connected with such service as to be a part thereof. It has frequently been held that mining, like manufacturing, is not interstate commerce'—citing numerous cases. 'That the rock which plaintiff was engaged in taking from the quarry at the time he was injured was intended for use in repairing the defendant's roadbed, which was being used for interstate commerce, did not make his employment interstate commerce.'

"To the same effect are the cases of Heisler v. Colliery Co., 260 U. S. 245, 43 S. Ct. 83, 67 L. Ed. 237; Oliver Iron Min. Co. v. Lord, 262 U. S. 172, 43 S. Ct. 526, 67 L. Ed. 929; United Mine Workers v. Coronado Coal Co., 259 U. S. 344, 42 S. Ct. 570, 66 L. Ed. 975, 27 A. L. R. 762.

"Thus, under the authorities, and especially under the authority of McLeod v. Sou. Pac. Co., supra, it would seem that the appellant, in blasting and breaking down rock, was engaged in mining, and, if the character of his work shall be regarded as such, then clearly he was not engaged in commerce.

"In the case of Karras v. C. & N. W. Ry. Co., 165 Wis. 578, 162 N. W. 923, L. R. A. 1917E, 677, it was held that the work being done by a railroad employee when injured determines whether he was engaged in interstate commerce within the Employers' Liability Act, and that, where a railroad section repair hand was peeling ties intended for use in defendant's interstate roadbed when injured, he was not engaged in interstate commerce within the federal Employers' Liability Act. To the same effect are the cases of Missouri, K. & T. Ry. Co. v. Watson (Tex. Civ. App.) 195 S. W. 1177, and Sullivan v. C., M. & St. P. Ry. Co., 163 Wis. 583, 158 N. W. 321. In the latter case the court said:

"'Without going into the technic of the matter, we will state our conclusion to be that work of preparing articles for interstate commerce is not a part of such commerce, within the meaning of the federal Employers' Liability Act'"—citing a number of cases from the Supreme Court of the United States'"

CONSTITUTIONAL LIMITATIONS ON DIRECT AND INDIRECT TAXES

By Walter E. Barton*

In a former article we stated that the distinction between direct and indirect taxes as contemplated by the Constitution was not settled satisfactorily by the courts during the first century of our constitutional history.[1] It remained for the Supreme Court to set the question at rest in 1895 in the famous case of Pollock v. Farmers' Loan and Trust Company.[2]

This case arose under the Act of August 15, 1894, which imposed a tax "upon the gains, profits and income received in the preceding calendar year by every citizen of the United States, whether residing at home or abroad, and every person residing therein, whether said gains, profits or income be derived from any kind of property, rents, interest, dividends or salaries, or from any profession, trade, employment or vocation carried on in the United States, or elsewhere, or from any other source whatever * * *."

The constitutionality of the Act was attacked on the ground that it imposed a tax on the income from realty and personalty without apportionment among the several states pursuant to the Constitution.[3] It was argued by the plaintiff that a tax on the income from realty or personalty was equivalent to a tax on the realty or personalty itself; that a tax on realty or personalty was a direct tax; and, therefore, that a tax on the income therefrom was a direct tax. It was argued by the government that the tax imposed was an excise or duty and that the Act should be upheld unless the court were willing to hold that

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(1) "Direct and Indirect Taxes as Contemplated by the Constitution," National Income Tax Magazine, October, 1925.

(2) 157 U. S. 429, 158 U. S. 601.

(3) Another question not pertinent to this discussion was whether the Act was constitutional in so far as it imposed a tax on the income from municipal bonds.

five of its former decisions were erroneous and should be reversed.

In approaching the question, the court reviewed the historical circumstances attending the framing and adoption of the Constitution and adverted to the debates of Congress when the Act of June 5, 1894, was being enacted.

The cases chiefly relied upon by the government, were Hylton v. United States,[4] Pacific Insurance Company v. Soule,[5] Veazie Bank v. Fenno,[6] Scholey v. Rew,[7] and Springer v. United States.[8] In these cases the court had stated *per dicta* that direct taxes as contemplated by the Constitution included only taxes on land and capitation taxes. In the case of Springer v. United States, supra, the court had held that the tax imposed by the Act of March 3, 1865, "upon the annual gains, profits and income of every person • • • whether derived from any kind of property, rents, interest, dividends or salaries" was an excise or duty and, therefore, constitutional.

One of the preliminary questions for the court to decide in the Pollock case was whether the rule *stare decisis* applied. Anything that had been said in the earlier cases to the effect that direct taxes included only taxes on real estate and capitation taxes was mere *dictum* and not binding on the court in the Pollock case.

This, however, did not dispose of the Springer case. That was an action of ejectment brought on a tax deed issued to the United States on the sale of the defendant's real estate for income taxes. The defendant contended that the deed was void because the tax was a direct tax and not levied according to the rule of apportionment. The original record disclosed that no part of the taxpayer's income was from real estate; that a part was derived from the practice of the law, and a part as interest from United States bonds. The latter, of course, was income from personalty so was a part of the income in the Pollock case.

In the Springer case the court had concluded:

"Our conclusions are, that direct taxes, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate; and that the tax of which the plaintiff in error complains is within the category of an excise or duty."

In referring to this language, the court in the Pollock case stated that while the language used was broad enough to cover the interest from United States bonds as well as the professional earnings, the validity of the tax as to either would have been sufficient to support the deed on which the action of ejectment was predicated.

The court thereupon concluded that in all of the cases from that of Hylton to that of Springer, it had been conceded that taxes on land were direct taxes; that in none of the cases had it been decided that taxes on rents or income derived from land were *not* direct taxes; and that in none of the cases had the question been discussed as to whether a tax on the income from personalty was equivalent to a tax on the personalty itself. The rule *stare decisis*, therefore, did not apply.

Was a tax on the income from realty equivalent to a tax on the realty itself? In considering this question the court adverted to various decisions of the Supreme Court wherein it was held that a tax on the occupation of an importer was equivalent to a tax on imports themselves;[11] that a tax on the income from United States securities was equivalent to a tax on the securities themselves;[12] that a tax on the income of an officer was equivalent to a tax on the office itself;[13] that a tax on a bill of lading was equivalent to a tax on the articles which it represented;[14] that a tax on the interest from bonds was equivalent

(4) 3 Dall. 171.
(5) 7 Wall. 433.
(6) 8 Wall. 533.
(7) 23 Wall. 331.
(8) 102 U. S. 586.

(11) Brown v. Maryland, 12 Wheat 419.
(12) Weston v. City Counsel, 2 Pet. 449.
(13) Dobbins v. Commissioner, 16 Pet. 435.
(14) Almy v. California, 24 Howard 169.

to a tax on the bonds themselves;[15] that a tax on the amount of sales of goods sold by an auctioneer was equivalent to a tax on the goods themselves;[16] and that a tax on the income from United States commerce was the same as a tax on the commerce itself.[17] The court further pointed out that under well established law a devise or conveyance of the rents, profits or income from land constituted a devise or conveyance of the land itself.[18]

It was, therefore, held that an income tax on the income from realty was the same as a tax on the realty itself, and that inasmuch as a tax on realty was a direct tax, a tax on the income therefrom was a direct tax also. In so far as the act applied to the income from realty, it was held to be unconstitutional. Mr. Justice White and Mr. Justice Harlan dissented, and Mr. Justice Jackson was absent on account of illness.[19] On the question of whether a tax on the income from personal property was a direct tax, the court was evenly divided.

Counsel for the plaintiff took advantage of the equal division of the court on this question and applied for a rehearing. The government acquiesced but asked the court to order the rehearing to cover both questions,—the one which was decided as well as the one which was not. This was done. The rehearing was before a full bench, Mr. Justice Jackson having improved sufficiently, although he died a few months later.

In reconsidering the questions the court stated in part:

"We know of no reason for holding otherwise than that the words 'direct taxes' on the one hand, and 'duties, imposts and excises,' on the other, were used in the Constitution in their natural and obvious sense. Nor, in arriving at what those terms embrace, do we perceive any ground for enlarging them beyond, or narrowing them within, their natural and obvious import at the time of Constitution was framed and ratified.'

(15) R. R. Co. v. Jackson, 7 Wall. 262.
(16) Cook v. Pennsylvania, 597 U. S. 566.
(17) Philadelphia and S. S. S. Co. v. Pennsylvania, 122 U. S. 326.
(18) Co. Lit. 45; 1 Jarm. Wills (5th Ed.), 798.
(19) Warren's "The Supreme Court in United States History," Vol. 3, p. 421.

This was in answer to the dissenting opinions of Mr. Justice White and Mr. Justice Harlan and the argument of counsel for the government that the framers of the Constitution had repudiated the economic definition of these terms and had attached to them a special meaning at the time the Constitution was adopted.

With the natural and obvious meaning of the terms in mind, the court asked whether there was any logical basis for holding that a tax on real estate belonged to one classification and a tax on the income or rents therefrom to another, and then proceeded to answer the question:

"There can be but one answer unless the constitutional restriction is to be treated as utterly illusory and futile, and the object of its framers defeated. We find it impossible to hold that a fundamental requisition, deemed so important as to be enforced by two provisions, one affirmative and one negative, can be refined away by forced distinctions between that which gives value to the property and the property itself.

"Nor can we perceive any ground why the same reasoning does not apply to capital in personalty held for the purpose of income or ordinarily yielding income, and to the income therefrom."

The court was careful to limit the scope of its decision in the following words to the specific questions raised:

"We have considered the act only in respect of the tax on income derived from real estate and from invested personal property, and have not commented on so much of it as bears on gains or profits from business, privileges, or employments, in view of the instances in which taxation on business, privileges, or employments has assumed the guise of an excise tax and been sustained as such."

Shift of Vote Criticized

The action of the court in declaring the act unconstitutional provoked very bitter criticism against the supreme tribunal. This was in part induced by the fact that Mr. Justice Shiras changed his mind after the original decision and voted with the majority on the final decision in holding the act void. Mr. Justice Jackson, who was not present at the original hearing, dis-

sented, but the action of Mr. Justice Shiras in changing his mind resulted in a five-to-four decision against the validity of the act.[20]

Notwithstanding the criticism of the court the decision was unquestionably sound. The question was settled definitely that a tax on realty or personalty or on the income from realty or personalty was a direct tax which was required to be laid according to the rule of apportionment. The court did not hold that Congress had no power to lay a tax on the income from realty or personalty. This power Congress always has had. The decision was to the effect merely that in laying such tax the rule of apportionment and not the rule of uniformity applied. The court refused to pass on the question of whether a tax on the income from business, privileges or employments was a direct tax or an excise, but there was a strong intimation that it was an excise. This was later reiterated in the case of Flint v. Stone Tracy Company.[21]

The result of the Pollock decision was for all practical purposes to defeat the income tax. The laying of any tax by the rule of apportionment is inequitable as was pointed out in a previous discussion.[22] If to this there be added the ojection that the tax shall not apply to realty or personalty or to the income therefrom, the impracticability and inequity of the tax becomes more pronounced. The ultimate result of the decision was the adoption of the Sixteenth Amendment, which removed the necessity of laying a tax on incomes by the rule of apportionment.[23]

The adoption of the Sixteenth Amendment, however, was not instantaneous. Eighteen years were required to obtain the necessary resolution by Congress and ratification by the legislatures of the several states. In the meantime Congress passed the Act of 1909, which laid "a special excise tax with respect to the carrying on or doing business by such corporation, joint stock company or association, or insurance company, equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources • • •."

The constitutionality of this act was raised in the case of Flint v. Stone Tracy, supra. It was argued by the taxpayer that the tax was direct in so far as it was measured by the income from realty or personalty, citing the Pollock case. In reply to this the court said:

"Within the category of indirect taxation, as we have further occasion to show, is embraced a tax upon business done in a corporate capacity, which is the subject-matter of the tax imposed by the Act under consideration. The Pollock case construed the tax there levied as direct, because it was imposed upon property simply because of ownership. In the present case the tax is not payable unless there be a carrying on or doing of business in the designated capacity, and this is made the occasion for the tax, measured by the standard prescribed. The difference between the Acts is not merely nominal, but rests upon substantial differences between the mere ownership of property and the actual doing of business in a certain way. • • •

"The tax under consideration, as we have construed the statute, may be described as an excise upon the particular privilege of doing business in a corporate capacity. • • •"

In other words, while Congress could not under the Constitution lay a tax on realty or personalty or the income therefrom except by apportioning the tax, Congress could lay a tax without apportionment on corporations for the privilege of doing business in a corporate capacity and measure the tax by income from all sources, including income from realty or personalty. The tax in the latter case would be on the privilege of doing business in a corporate capacity, and not on the income derived from such business.

Without indulging in generalities, we conclude that capitation or poll taxes on

(20) Warren's "The Supreme Court in United States History," Vol. 3, p. 422.
(21) 220 U. S. 107.
(22) "Constitutional Tax Apportionment & Uniformity Requirements." National Income Tax Magazine, May, 1925.
(23) Brushaber v. U. P. R. R. Company, 240 U. S. 1.

realty or personalty are direct taxes which are required to be apportioned pursuant to the Constitution;[24] that taxes on the income from realty or personalty are direct taxes which are not required since the Sixteenth Amendment to be apportioned; and that the following are examples of indirect taxes which under the Constitution are required to be laid uniformly throughout the United States: taxes on corporations with respect to carrying on or doing business;[25] taxes on businesses, privileges, occupations, or vocations,[26] taxes on succession to property on the death of the owner;[27] taxes on transfers made in contemplation of death;[28] taxes on the circulation of bank notes;[29] stamp taxes;[30] and taxes on the importation, sale, manufacture or lease of commodities. This list does not purport to be complete.

The effect of the adoption of the Sixteenth Amendment has been considered by the Supreme Court in a number of decisions. This subject is discussed in the August, 1926, number of the National Income Tax Magazine.

(24) Article I, Section 1, Clause 4; Article I, Section 9, Clause 4; Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429, 158 U. S. 601; Brushaber v. U. P. R. R. Co., 240 U. S., 1; Cooley's "Taxation," Fourth Edition, Vol. 1, p. 247.
(25) Flint v. Stone Tracy Co., 240 U. S. 1; Spreckles Sugar Refining Co. v. McClain, 192 U. S. 397.
(26) Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429, 158 U. S. 601; Flint v. Stone Tracy Co., 240 U. S. 1.
(27) Scholey v. Rew, 23 Wall. 331; Knowlton v. Moore, 178 U. S. 41.
(28) Schwab v. Doyle, 269 Fed. 321.
(29) Veazie Bank v. Fenno, 8 Wall. 533.
(30) Nichol v. Ames, 173 U. S. 509; Thomas v. U. S., 192 U. S. 363.

EPILEPSY AND THE LAW

By Perry M. Lichtenstein,
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There seems to be a close relationship between certain diseases and the law. Of these, epilepsy is particularly interesting not alone because of its prevalence but also because at times this disease leads to a definite insanity and people committing acts during such a period are as truly insane as are those suffering from paranoia. I do not wish to convey the thought that all epileptics are insane, but there is no doubt that an epileptic may at any moment become insane. In order to fully understand this condition it is necessary that I briefly describe the disease.

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Epilepsy may be defined as an affection of the nervous system characterized by transient or complete loss of consciousness. The form which is characterized by transient loss of consciousness, without convulsions, is known as petit mal and that form which in addition to unconsciousness is accompanied by convulsive seizures, is known as grand mal. There may or there may not be a history of convulsions during childhood. Such a history is, however, sometimes obtained. Heredity is not as important an etiological factor as some believe. Very few of my cases gave such a history. Children of neurotic families are prone to develop the disease and alcoholism in the parents is a most important cause. Other causes are traumatism to head, syphilis and in children, dentition.

What relation does epilepsy bear to the law? There are certain times in an epileptic's life when he may not be responsible for his acts. Epilepsy may be associated with acts of violence for which there appears to be no motive. It is because of this fact that it is extremely important to thoroughly investigate every fact in connection with homicide cases where epilepsy is a defense in order to make sure that the epilepsy actually entered into the case at the time the act was committed. In this connection it is to be remembered that not every case where one obtains a history of epilepsy signifies insanity. Many epileptics commit acts and are legally sane, that is, they know the nature and quality of the act and the difference between right and wrong at the time the act is committed. I will state positively that, considering the number of criminal insane coming to the Tombs, the defense of epileptic insanity

as a defense in homicide cases, is rarely made.

When then, is epilepsy a defense? The mental disorders resulting from epilepsy may be classified in their relationship to the paroxysms into the pre-epileptic, the epileptic or epileptic equivalent, and post-epileptic periods. The pre-epileptic period immediately precedes the epileptic paroxysm; the epileptic equivalent is a mental disordered state which takes the place of the convulsion or fit, and the post-epileptic period closely follows an actual convulsion or fit. In any of these periods an epileptic may commit acts for which he is not responsible. In many of the pre-epileptic insanities the criminal act is but a continuation of that which a person was engaged in at the time the seizure occurred. In this relation it has been known that people have committed homicide by cutting the throat of one they were devoted to simply because at the time when seized with the attack the epileptic had a knife in his hand and was about to cut some bread. Epileptics often commit murder. In fact, the acts of an epileptic are usually cruel and sudden in occurrence. Bianci cites the case of an epileptic who one evening was seized with a mental disturbance. He cut the throats of his two sisters who were asleep in bed and then got into bed between them and went to sleep. On awakening the next morning he found both sisters dead and notified the authorities. He had absolutely no recollection of the act.

Another case cited is that of a French judge who, while conducting court was seized with a desire to urinate. He was an epileptic. Without warning he arose and urinated in open court.

The epileptic equivalent cases are at times quite puzzling. Sometimes acts are committed by these people with apparent premeditation and deliberation and yet, after the equivalent period has passed only a fragmentary or no recollection of the act remains. The chief characteristic of epileptic unsoundness is the amnesia of the act. For this reason an epileptic insanity defense in homicide cases is looked on with suspicion for it seems very convenient to forget any and everything connected with the act. Such cases, however, do occur. Last month a certain defendant was brought to the Tombs charged with stabbing his wife. He was a colored man about forty-seven years of age and gave a history of both petit and grand mal seizures. When he arrived in the Tombs he was very confused and would answer but few questions. He was also very much depressed, and I ordered him placed under observation. A blood examination showed a four plus Wasserman reaction, indicative of syphilis. While under observation he was morbidly depressed, spoke in monotone, slept poorly, ate poorly and complained of headaches. I observed him in several petit mal seizures. At such times he would stop answering the question asked him, would stare, then act as if he had a chill. In a short time this passed off and it was necessary to repeat the question. His mental deterioration was marked in that his memory was extremely poor, his orientation as to time and place was poor. General intelligence was practically nil and his judgment and reasoning were very poor. A lunacy commission was appointed by Hon. Francis X. Mancuso, of the Court of General Sessions. While being examined by the commission doctor, the defendant had several petit mal seizures. He was arrested for killing his wife, and the history indicated that defendant had returned from work and found his wife drinking. She was visiting a friend and he met her at this place. He urged her to go home and get his supper, which she did. Defendant took a bath and his wife again went to her friend's home. That is all he recalls. He did not recall having quarreled with his wife nor did he recall stabbing her. The observation and examination of defendant established absolutely

that at the time of the crime he was suffering from an epileptic equivalent attack.

Many years ago a man named Woods was arrested for killing his wife and was brought to the Tombs. He was an epileptic and had committed the act during an equivalent state. The day following his arrest he wrote a letter to his wife asking her to bring him some clothes to the Tombs. He had absolutely no recollection of the act.

Post-epileptic insanity follows an epileptic attack. Uusually, following a convulsive seizure, the person is in a dazed condition. Sometimes, during such a period, mental disturbances occur. Recently a negro was arrested charged with grand larceny. He was an epileptic and suffered severely from this disease. In fact, he would go from one convulsive seizure into another. At times, while under observation in the Tombs he would walk up and down in his cell, hit his head against the wall, refuse food, shake the cell door and refuse to sleep. These attacks always followed an epileptic seizure and defendant had no recollection of his actions. The history of the case showed that he was an epileptic from childhood. During one of these periods he took some money. This was during the day. He made no attempt to run away, and when arrested the money was found on his person. There was a complete amnesia of the act. A thorough investigation by a lunacy commission convinced the members of that body that this defendant was not simulating, but was truly insane at the time that the act was committed and he was accordingly sent to an insane asylum.

One should remember that epilepsy may coexist with perfect sanity. One should also remember that frequent attacks of epilepsy cause mental deterioration. This is particularly so where epilepsy begins in childhood. It then leads to stunting and enfeeblement of the intellect. On many occasions we receive boys in the Tombs who, though epileptics with a history of the disease dating back to childhood, are sane, but practically all are mental defectives, and in such cases a recommendation to the court is made that defendant be sent to Napanoch.

Epilepsy which occurs with great frequency tends to impair the memory, reasoning powers, emotions, to change the character of the individual, and to dull the sensibilities. Self-control is greatly interfered with so that such individuals are impulsive and excitable. There are cases where convulsive seizures occur, but only at long intervals, and in such instances there is little impairment of the intellect. History teaches that Napoleon, Mahomet and Julius Caesar were epileptics who suffered from occasional attacks.

In conclusion I will state that in many cases where people are arrested for indecent exposure and shoplifting one obtains a history of epilepsy. It is therefore advisable that a complete history and a thorough investigation of the case be made, for such people may be irresponsible.

SPEED REGULATIONS—FIRE DEPARTMENT VEHICLES

WHITE v. CITY OF CASPER

249 PAC. 562

(Supreme Court of Wyoming. Oct. 4, 1926.)

Generally where a municipality exercises governmental functions in operating fire apparatus, and statute is passed to regulate speed of vehicles generally, it will not be assumed that regulation was intended to apply to operation of such fire apparatus unless intention is couched in express terms or is manifested by unavoidable implication.

Hal Curran, of Casper, for appellant.

E. H. Foster, R. M. Boeke, and Robert N. Ogden, Jr., all of Casper, for respondents.

BLUME, J. This is a suit brought by the plaintiff and appellant against the city of Casper and others, respondents herein, to recover the sum of $21,057.92 as damages resulting from a collision of a fire truck of said city with plaintiff's automobile. A demurrer was filed to the amended petition of plaintiff and was sustained on the ground that the facts

alleged were insufficient as a cause of action. The plaintiff refusing to plead further, judgment was rendered for the defendants, from which the plaintiff has appealed.

The codefendants of the city are the persons who were engaged in the active operation of said city's fire department. Nothing is said in the briefs, however, as to their liability, and the only question presented is as to whether or not the amended petition filed in this case is sufficient to disclose a liability on the part of the city of Casper, and we shall confine our discussion to that point. The collision aforesaid happened, as disclosed by the amended petition, between 2 and 3 o'clock in the afternoon of October 7, 1921, on Center street in said city. A fire alarm, operated by said city, sounded while plaintiff, in a Marmon car, was driving south on said street and while crossing the intersection of First street with Center street. Immediately after hearing the fire alarm, plaintiff attempted to turn his automobile close to the curb, in obedience to the ordinances and traffic regulations of said city. No parking space along the curb was available, and he, accordingly, parked his car parallel with the curb and as close to the other cars there parked as possible. Shortly thereafter a fire truck of said city drove into and collided with plaintiff's automobile, demolishing it and inflicting bodily injuries upon plaintiff. A claim for his damages was duly filed with and rejected by said city.

In addition to these facts, plaintiff pleaded the following as a basis for holding the city liable, namely: (a) That the fire truck was, at the time of the collision, operated by the duly authorized agents of the city at a high and dangerous rate of speed. (b) That the fire to which the fire-fighting apparatus was taken at the time mentioned was located at or near the building designated as 425 East First street, far out of the congested district of said city. That the fire truck could have been taken to the scene of the fire easily by avoiding such congested district. That the locality of the fire did not constitute a "grave fire hazard," and the danger from fire did not justify excessive speed. (c) That the said fire truck was driven along Center street, and that portion thereof which, at the time of the accident, was the most congested part of the city. That by taking this street the distance to the fire was greater than if less congested streets had been taken, and Center street was taken merely for show and display, as was well known to the managing authorities of said city. (d) That said city had, immediately prior to said collision, sprinkled said Center street, rendering it wet, slippery, and dangerous for a few blocks each way from the scene of said collision. That such dangerous condition could have been seen by the agents of the city operating said fire apparatus in ample time to have avoided it. (e) That the driver of said fire truck was incompetent, incapable and inexperienced. That he was at the time suffering from eye trouble and was under the care of an eye specialist, all of which facts were well known to the city. (f) That the city neglected and failed to enforce its "30-minute" parking ordinance, leaving plaintiff without parking space. That had such ordinance been enforced, appellant could have escaped injury. (g) That the driver of said fire truck lost control thereof. That it skidded to the right and to the left, and did not stay on the right side of the street. That said driver was able to see appellant for a distance of 900 feet and could have avoided the accident by slacking his speed and regaining control of said truck. (h) That the fire alarm, owned and operated by said city, was defective, so that it could not be heard in the congested portion of said city—all to the knowledge of said city.

1. We pointed out in the case of Ramirez v. City of Cheyenne (Wyo.) 241 P. 710, 42 A. L. R. 245, that it is held almost without dissent that the maintenance of a fire department is a governmental function. And the decisions are nearly unanimous to the effect that, in the absence of statutory provisions to the contrary, a municipality is exempt from liability for injuries to persons or property resulting from malfeasance or nonfeasance in the maintenance and operation of a fire department by such municipality. These decisions, numbering about 100, are cited and reviewed by exhaustive notes in 9 A. L. R. 143, 157, and in 33 A. L. R. 688, 691. The more recent cases are to the same effect: Rollow v. Ogden City (Utah) 243 P. 791; Young v. Lexington, 212 Ky. 502, 279 S. W. 957; Mabe v. Winston-Salem, 190 N. C. 486, 130 S. E. 169; Gregoire v. Lowell (Mass.) 148 N. E. 376; Florio v. Jersey City (N. J. Err. & App.) 129 A. 470, 40 A. L. R. 1353; Board v. Bowen's Adm'x, 205 Ky. 309, 265 S. W. 785; Barnes v. Waco (Tex. Civ. App.) 262 S. W. 1081. The contrary rule is held by very few cases, mainly by Kaufman v. City of Tallahassee, 84 Fla. 634, 94 So. 697, 30 A. L. R. 471, and Tallahassee v. Kaufman, 87 Fla. 119, 100 So. 150. The case of Fowler v. Cleveland, 100 Ohio St. 158, 126 N. E. 72, 9 A. L. R. 131, was to the same effect, but was expressly overruled in the later case of Aldrich v. Youngstown, 106 Ohio St. 342, 140 N. E. 164, 27 A. L. R. 1497.

We held in the Ramirez Case, supra, that a municipality might be held liable under certain circumstances for damages caused by dangerous appliances left in a park, and in the case of Opitz against the town of Newcastle, decided this day, it is held that a municipality is liable for damages resulting from leaving an open hole in a street therein without maintaining protective barriers or other signals to warn travelers of danger; but we cannot extend the rule of these cases to the case at bar. We do not believe that we are warranted in departing in this case from the principle that a municipality is exempt from liability in its operation of a governmental function, and in deciding, contrary to the overwhelming weight of authority, that a municipality is liable for negligence in the operation of its fire department, unless there are special facts in the case by which we would be justified to take it out of the general rule. In the note to 9 A. L. R. 150 and 151, illustrations are given as to when a municipality is exempt from liability for acts in connection with the operation of such department. Instances of that kind are as follows: For negligent driving of a fire apparatus in going to a fire; for carelessness of a fireman in drawing a hose cart against a person on a public street while answering an alarm of fire; for negligent driving in going from a fire back to a firehouse for more hose to use in fighting a fire; for reckless driving of a fire apparatus, negligently running down a pedestrian on a street. It is clear that at least most of the acts of negligence alleged in the case at bar come within the principle of these cases. To drive a fire apparatus to a fire negligently or recklessly, and without control of the apparatus, and on the wrong side of the street, or in a street which is crowded where it was unnecessary to drive, and to have a fire alarm system which was defective, are clearly acts of negligence in the operation of the fire department of the city for which, under the rule of the cases mentioned, the city is not liable. And that is no less true where the city hires or retains an incompetent servant in connection with that department, though the incompetency of the servant is known. This specific point has been decided in the case of Higgins v. City of Superior, 134 Wis. 264, 114 N. W. 490, 13 L. R. A. (N. S.) 994, where the court said in part:

"The gravamen of the complaint is the negligence of the driver of the team and the omission of the city authorities to fully discharge their public duty by selecting and retaining him in the employ of the city with knowledge of his negligent conduct and intemperate habits. Unquestionably the city officers were remiss in their official duties, if they selected and retained an incompetent and reckless driver to take charge of a team connected with the city's fire department. Such neglect of duty, however constitutes no legal ground for holding the city liable for the damages resulting therefrom."

2. It is claimed that the city is liable because of the nonenforcement of its parking ordinances, by reason of which plaintiff was unable to find a parking space along the curb of Center street at the time of the collision. It is clear, however, we think, under the allegations of the amended petition, that such negligence, if any, was merely a condition and not the proximate cause of the injury. The efficient cause was the alleged negligent driving of the fire apparatus along Center street, and brought about the accident and was the proximate cause thereof. Lemos v. Madden, 28 Wyo. 1, 200 P. 791. Further, it is the general rule that, except in cases, perhaps, where a nuisance is created, which is not true in this case, a municipality is not liable for the nonenforcement of its ordinances. 28 Cyc. 1289, 1356, 1357. See Bradley v. Oskaloosa, 193 Iowa, 1072, 188 N. W. 896.

3. Nor can the city be held liable because it sprinkled the street over which the fire apparatus was negligently driven. There can be no question that the city had a perfect right to sprinkle its streets. That is one of the functions of a municipality very commonly exercised, and of importance to the health and welfare of the citizens of the community. The sprinkling of a street, especially a paved street, necessarily makes it slippery for the time being, but that itself cannot be held to constitute negligence. Such condition must, of course, be taken into consideration in driving along the street, and failure to do so may constitute negligence; and when the driver of the fire apparatus in the case at bar failed to take the slippery condition of Center street into consideration, so that the fire apparatus swerved from one part of the street to the other, he was, perhaps, negligent, but this negligence was in the operation of the fire department of the city, a governmental function, and for which the city, according to the general rule, cannot be held liable.

4. One other point is still to be considered. Plaintiff alleged in his amended petition that there was a fire to which the fire apparatus was driven at the time of the accident in question, but stated that the locality of the fire did not constitute a grave fire hazard, and that the danger from fire did not justify excessive speed. It is the theory of counsel for the plaintiff that

there must have been an actually existing emergency, as proven by the facts, which would justify excessive speed, in order to exempt a municipality from liability for damages caused thereby, and that, inasmuch as the existence of such emergency was negatived by the amended petition, the demurrer thereto should have been overruled. This theory is based upon the provisions of the motor vehicle law of this state. Now the general rule is that where, as here, a municipality exercises governmental functions in operating fire apparatus, and a statute is passed for the purpose of regulating the speed of vehicles generally, it will not be assumed that the regulation was intended to apply to the operation of such fire apparatus unless such intention is couched in express terms or is manifested by necessary or unavoidable implication. Fire trucks are used for a special purpose only, and are not used or intended to be used on the streets for either pleasure or business purposes, and are not considered as coming within the designation of ordinary vehicles. Rollow v. Ogden City, supra, and cases in note to 19 A. L. R. 459. We find no mention, express or implied, in our motor vehicle law of any fire apparatus, except in section 3487, W. C. S. 1920, in force at the time of the accident in the case at bar, and, bearing the foregoing rule in mind, the section just mentioned is the only one which could have a bearing on the case at bar. That section, in so far as it may relate to cities and towns, is as follows:

"No motor vehicle shall be operated within any city or town at a speed greater than twenty miles per hour, nor at a rate of speed such as to endanger the life or limb of any person, having regard for the traffic, use and condition of the road or other public highway. Upon approaching the intersection of highways, or a bridge, or a sharp curve, or a steep descent, or another vehicle, or an animal or a person outside of any city, or town, the person operating the motor vehicle shall give a timely signal with his bell, or horn, and shall reduce the speed of such motor vehicle to a reasonable rate, and shall not exceed such speed until entirely past such intersection, bridge, curve, descent, vehicle, animal or person. Upon approaching any place where passengers are getting on or off street cars, every person operating a motor vehicle shall bring such vehicle to a full stop, and shall not start again until said street cars have started. Provided that the speed limits in this section shall not apply to physicians or surgeons, or police or fire vehicles, or ambulances, when answering emergency calls demanding excessive speed."

A similar provision was before the court in the case of Opocensky v. City of South Omaha, 101 Neb. 336, 163 N. W. 325, L. R. A. 1917E, 1170. In that case an automobile, used in connection with the fire department, was driven negligently along a street at a high and dangerous rate of speed, in order to test it out and not while answering a fire call. The court held that no emergency existed, that the exemption in the statute as to speed did not apply, and that, under the circumstances, the city was liable for damages caused by the dangerous and excessive speed. The case has no application to the case at bar, for here the existence of a fire at the time of the accident, and the fact that the fire apparatus, which collided with plaintiff's automobile, was being driven to this fire, is not questioned. We think that the exemption mentioned in the statute above quoted contemplates that an actually existing fire in the city is an emergency which justifies excessive speed, and that the men operating the fire department may construe it to be such. Whether a fire in a city is or is not of a grave character cannot, in many cases, be determined in the first instance. It may or may not be, depending on many different circumstances. A fire that at a casual glance would appear insignificant might, under favorable conditions, be turned into a conflagration. We cannot believe that the Legislature intended that the character and extent of the fire must, in order to justify excessive speed, be determined beforehand—and that at the peril of the city.

We think the demurrer was properly sustained. The judgment below must accordingly be affirmed, and it is so ordered.

Affirmed.

NOTE.—*Statutes Regulating Speed of Vehicles as Applicable To Fire Department Vehicles.*—It is generally held that Statutes and Ordinances regulating the speed of vehicles in the highways do not apply to Fire Department vehicles.—Kansas City v. McDonald, 60 Kan. 481, 57 Pac. 123, 45 L. R. A. 429; Warren v. Mendenhall, 177 Minn. 145, 79 N. W. 661; Farley v. New York, 152 N. Y. 222, 46 N. E. 506, 57 Am. St. Rep. 511; Oklahoma R. Co. v. Thomas, 63 Okla. 219, 164 Pac. 120; Waddell v. Williamson, W. Va., 127 S. E. 396.

General words of a statute will not be construed to include the Government or its agencies so as to impair sovereign power, unless expressly included by name or unless that construction be clear and undisputable. Belthasar v. Pacific Electric R. Company, 187 Cal. 302, 202 Pac. 37.

"It would be an affront to the intelligence of the Legislature to hold that, in enacting a statute designed to suppress speeding it intended to restrict peace officers to the prescribed speed limits when in pursuit of violators of the statute." Edberg v. Johnson, 149 Minn. 395, 184 N. W. 12.

DIGEST

Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this Digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Animals** — "At Large." — Dogs, killed or wounded by accused while trailing rabbits, at command and within call or presence of owner, though on property of defendant held as matter of law not at large and not trespassers.—Uebele v. State, Ohio, 153 N. E. 215.

2. **Arrest**—False Arrest.—Where conductor put passenger off train against his will and placed him in custody of marshal, railroad was responsible for marshal's conduct tending to furnish passenger with reasonable ground to believe that he was under arrest, and evidence of such conduct was admissible.—Humphreys v. St. Louis-San Francisco Ry. Co., Mo., 286 S. W. 738.

3. **Automobiles**—"Accident."—If plaintiff inadvertently slipped his finger between body of automobile and door at instant defendant attempted to close it, so that neither had chance to prevent injury, that would have been an accident; "accident" being a happening of an event from an unknown cause.—Yawitz v. Novak, Mo., 286 S. W. 66.

4.——Bill of Sale.—Sale of secondhand motor vehicle is not void because not accompanied by bill of sale and transfer of license receipt required by statute.—Le Sage v. Maxie, Tex., 286 S. W. 612.

5.——Collision.—In action for injuries in collision with defendant's truck, on evidence showing that truck had no light on rear, as required by Laws 1921, p. 707, § 3, subd. 5[c], even if injury was product of concurring negligence of defendant and of driver of automobile in which plaintiff rode, denying motion for nonsuit and motion for directed verdict was not error.—Ross v. Willamette Valley Transfer Co., Ore., 248 Pac. 1088.

6.——Measure of Damages.—Measure of damages to automobile from collision is difference in its value immediately before and immediately after injury, or reasonable cost of repairs, if less than difference in values.—Menefee v. Raisch Improvement Co., Cal., 248 Pac. 1031.

7.——Registration.—Sale of second-hand automobile by dealer without compliance with Vernon's Ann. Pen. Code Supp. 1922, arts. 1617¾d-1617¾f, relative to registration held not void.—Moore v. Galey, Tex., 286 S. W. 679.

8.——Speed.—Instruction that it was not negligence to drive at statutory speed, in absence of warning of "danger ahead," held proper, in absence of allegation or proof of negligence, except with respect to speed.—Strickfaden v. Green Creek Highway Dist., Idaho, 248 Pac. 456.

9.——Striking Pedestrian.—City ordinance relating to conduct of automobile drivers in relation to each other on through traffic streets was not relevant in action for injuries to pedestrian from being struck by automobile.—Hanna v. Royce, Ore., 249 Pac. 173.

10.——Wife's Negligence.—Husband, who bought automobile for wife to be used by wife and family held liable, under law of principal and agent, for wife's negligence.—Cohen v. Hill, Tex., 286 S. W. 661.

11.——Without Owner's Consent.—Where state amended indictment for larceny of automobile to charge using automobile on highway without owner's consent, charge of larceny was eliminated, and on verdict of "guilty as charged in indictment," sentence to imprisonment in penitentiary was error, under Code 1923, § 4913.—Stephens v. State, Ala., 109 So. 525.

12. **Bankruptcy**—Contingent Interest. — Contingent interest, depending on survival, is assignable in equity, and hence passes to trustee in bankruptcy as property which bankrupt could have transferred before adjudication within Bankruptcy Act, § 70 (U. S. Comp. St. § 9654).—Reilly v. Mackenzie, Md., 134 Atl. 502.

13.——Restitution.—Where bankrupt used money stolen from defendant to pay for merchandise, repayment of amount stolen to defendant on demand held restitution, and not voidable preference, where repayment was made before insolvency, and plaintiff believed bankrupt to be solvent.—Saperston v. National Bond & Inv. Co., N. Y., 217 N. Y. S., 611.

14.——Review.—After appointment and qualification of trustee, single creditor has no standing to petition for review of order affecting estate generally, which can only be done by the trustee, and if he refuses to act, application should be made to referee or judge to require him to act, or to authorize creditor to act in his name.—In re New England Tire & Rubber Co., U. S. D. C., 13 F. (2d) 1004.

15.——Setting Aside Transfer.—In suit by trustee in bankruptcy to set aside transfer of property on ground of defrauding creditors of bankrupt, receiver in state court proceedings, in which it was determined bankrupt had no title or interest in property held not necessary party.—Detroit Trust Co. v. Schantz, U. S. D. C., 14 F. (2d) 225.

16.——Set-Off.—Bank, which was party to agreement for sale of assets of insolvent concern and for use of proceeds in particular manner held not entitled, when such proceeds were deposited with it, to appropriate them in satisfaction of its own claim against insolvent concern.—In re Gans & Klein, U. S. D. C., 14 F. (2d) 116.

17.——Suit in State Court.—Federal courts may stay proceedings in state court, begun prior to proceedings in bankruptcy, and stay taking of any steps embarassing equitable distribution of bankrupt estate.—Bailey v. Blackmon, U. S. C. C. A., 14 F. (2d) 16.

18.——Unrecorded Chattel Mortgage. — Where bankrupt purchased property more than four months prior to bankruptcy, giving a chattel mortgage for the price which though not recorded, was valid between the parties and against creditors not having liens, the fact that mortgagee took possession of the property within the four months, which had the same effect as recording held not to make the transaction a preferential transfer, voidable under Bankruptcy Act, § 60b, as amended by Act June 25, 1910, § 11 (Comp. St. § 9644).—Sample v. Getman-McDonnell-Summers Drug Co., U. S. D. C., 14 F. (2d) 170.

19. **Banks and Banking**—Offset.—Surety on depositary's bonds did not become creditor of depository until it paid obligees, and, that happening after superintendent of banks took charge of bank as insolvent, it was not entitled, either as subrogee or assignee, to offset its claim therefor on fidelity bond on which it was surety for bank's cashier.—Hammons v. United States Fidelity & Guaranty Co., Ariz., 248 Pac. 1086.

20.——Paying Check.—In action against bank for paying check on which payment was stopped, allegations showing money on deposit, issuance of check, notice to stop payment thereof, payment of check, demand for the money, and its nonpayment, with prayer for its recovery, stated a cause of action without alleging damage.—Hiroshima v. Bank of Italy, Cal., 248 Pac. 947.

21. **Bills and Notes**—Interest.—Nonpayment of past-due interest on negotiable instrument does not affect its maturity, and purchasers thereof in good faith for value are holders in due course.—Kreitz v. Savings Deposit Bank & Trust Co., Ohio, 153 N. E. 236.

22.——Place of Contract.—In absence of anything to contrary, fact that parties made note in one jurisdiction to be paid in another will justify conclusion that they intended law at place of performance to govern.—Joffe v. Bonn, U. S. C. C. A., 14 F. (2d) 50.

23.——Presentment.—As general rule, check should be presented within reasonable time, which depends on circumstances of each particular case, but where payee receives check in place where drawee bank is located, he should present it before closing of banking hours on next business day.—Koch v. Sanford Loan & Realty Co.—Mo., 286 S. W. 732.

24.——Presentment.—Where payee of check mailed it to drawer for correction through allowance of amount which had already been allowed in arriving at amount of check, and on return to him without change promptly presented it to bank on which it was drawn more than three days after it was issued, he must bear loss from insolvency of bank.—Koch v. Sanford Loan & Realty Co., Mo., 286 S. W. 732.

25. **Brokers** — Commission. — Where purchaser found by plaintiff and seller agreed on terms, plaintiff held entitled to commission though purchaser and seller subsequently agreed to modifications, and, because of inability of purchaser to comply with modifications, no sale was consummated.—Danciger v. Smith, Tex., 286 S. W. 633.

26.——Commission.—Where broker contracts, for commission, to procure loan, if he procures lender on agreed terms and within specified time and notifies proposed borrower, he is entitled to commission although borrower may not be able to complete transaction.—Allen v. Farmer, Ala., 109 So. 555.

27. **Carriers of Live Stock**—Delay.—In action for carrier's delay in shipment of cattle, circumstance of loading portion, and then taking engine on train going west, and neglect and refusal of east-bound train to complete loading and take cars, were sufficient to support inference of negligence.—Willer v. Chicago, M. & St. P. Ry. Co., S. D., 210 N. W. 81.

28. **Carriers of Passengers**—Convenience and Necessity.—Under Public Service Commissions Law, §§ 23, 53, as they existed in 1913, certificate of convenience and necessity granted to corporation organized under Transportation Corporations Law, § 20, to operate motor busses, without notice to electric urban and interurban railroad whose tracks paralleled bus route, and whose business would be seriously affected by operation of busses, in view of sections 22, 24, section 25, as added by Laws 1913, c. 495, § 1, and amended by Laws 1915, c. 667, § 1 and section 26, as added by Laws 1915, c. 667, § 2, and amended by Laws 1919, c. 307, was void and subject to collateral attack in any court.—Hudson Valley Ry. Co. v. United Transp. Co., N. Y., 217 N. Y. S. 614.

29.——Negligence. — That woman passenger, standing up in street car, with a suit case in her hand, fell and was injured when car stopped with a jerk held not to establish negligent operation of car.—Harkins v. Philadelphia Rapid Transit Co., Pa., 134 Atl. 376.

30. **Conspiracy**—Use of Mails.—In prosecution under Criminal Code, §§ 37, 215 (Comp. St. §§ 10201, 10385), for scheme to defraud in sale of mortgage company stock by use of mails, it is not necessary that indictment set out or describe letters charged to have been mailed.—Scheib v. United States, U. S. C. C. A., 14 F. (2d) 75.

31. **Constitutional Law**—Fraudulent Practices.—General Business Law, art. 23-A, § 352, as added by Laws 1921, c. 649, and amended by Laws 1923, c. 600, and Laws 1925, c. 239, authorizing Attorney General to issue subpoenas requiring attendance and examination respecting fraudulent practices in dealing in securities to discover whether cause of action exists held not grant of judicial power to executive officer in violation of Const. art. 6, in view of General Business Law, § 359, as added by Laws 1921, c. 649, and amended by Laws 1923, c. 600, and Laws 1925, c. 239, and Attorney General is not restricted to proceeding under section 354, as added by Laws 1921, c. 649, and amended by Laws 1923, c. 600, and Laws 1925, c. 239, where information is refused.—Dunham v. Ottinger, N. Y., 217 N. Y. S. 565.

32. **Corporations**—Express Contract with Employee.—Stockholder in employ of corporation held entitled to contract with it for part of profits from joint venture in manufacturing certain articles under contract between corporation and third party.—Allan v. Hargadine-McKittrick Dry Goods Co., Mo., 286 S. W. 16.

33.——Foreign Corporation.—Where foreign loan corporation was not licensed under Vernon's Ann. Civ. St. 1925, arts. 1529, 1536, to do business in Texas, assignee of its real estate mortgages, charged with knowledge thereof, could not intervene in garnishment proceeding to claim moneys impounded therein belonged to him under trust agreement with corporation.—Standard v. Cantwell, Tex., 286 S. W. 760.

34.——Place of Bringing Suit.—Where, notwithstanding contract recited it was signed in certain county, it appeared that defendant corporation signed it as indicated, but plaintiff signed it later in another county, contract was made in latter county, and hence action could be maintained therein on contract, in view of Const. art. 12, § 16, though defendant's principal place of business was in former county.—California Bean Growers' Ass'n v. C. H. & O. B. Fuller Co., Cal., 248 Pac. 967.

35.——Stock Subscription.—A. signed contract subscribing for 100 shares of corporation stock under secret agreement to pay for 10 shares only, and corporation represented to B. that A.'s subscription for 100 shares was genuine, and B. relying thereon subscribed for stock. Held, that fact that as against corporation A. could not enforce such secret agreement, but would be held for original subscription, did not establish truth of representation to B., which, if false in fact and B. relied thereon, constituted complete defense to suit on subscription against B.—Ziilox v. City View Apartment & Storage Co., Ohio, 153 N. E. 183.

36. **Covenants**—Building Restrictions.—Building, consisting of garage and five living rooms, occupied by tenants, erected in rear of defendant's dwelling held to violate restriction in deed, limiting use of premises to single family dwelling with necessary outbuilding.—Matthews v. Captain, N. J., 134 Atl. 359.

37.——Running with Land.—Where one who was the owner of a certain lot of land and the structures thereon, which was equipped with the necessary tanks and other materials requisite for the purpose of handling and selling at retail the products of a named oil company, sold and conveyed the lot to another party and inserted in the writing the following stipulation, towit: "It is agreed with the parties hereto that the said J. F. Posey (the grantee) is to use the Standard Oil Company gas and oil as long as the said G. C. Smith (the grantor) acts as agent for said company and the prices of same are in accord with other gasoline and oils," the clause quoted, construed in the light of the other facts in the record and the intention of the parties to the deed, amounted to a covenant running with the land. And where the grantee in the conveyance referred to above conveyed to a third party the same property, but omitted from his deed of conveyance all reference to the covenant and condition in the deed from the first grantor, nevertheless the covenant, being one running with the land, was binding upon the last grantee, and the first grantor may maintain a suit for injunction to prevent the violation of the covenant under the circumstances alleged in the petition.—Smith v. Gulf Refining Co., Ga., 134 S. E. 446.

38.——Use of Property.—Taking in guests who paid proportionate cost of their living expenses, though not use of premises as inn, tavern, or boarding house held violation of restriction requiring use of premises for single dwelling house exclusively.—Trainor v. Le Beck, N. J., 134 Atl. 355.

39. **Electricity**—Excessive Current.—Where deceased's death resulted from contact with a secondary wire in a drop cord charged with electric current in excessive quantities and of such high voltage as to be dangerous to anyone touching the cord, company furnishing electricity was liable in damages.—Morrow v. Missouri Gas & Electric Service Co., Mo., 286 S. W. 106.

40. **Explosives**—Negligence.—Defendant oil company by mistake mixed gasoline with kerosene furnished defendant Iverson. The deceased purchased some of this mixture. He started his fires with kerosene without kindling. His dwelling burned, and all the inmates perished. Two explosions were heard. The stove was found in fragments. The can was near it with the seams open. There was evidence that fuel had been placed in the stove. Held that the evidence sustains the finding that some of the mixture had first been poured on the ashes and fuel placed thereon, and then an attempt made to light it which resulted in the explosions; also the finding that the mixture was of a more inflammable character than kerosene of legal grade and its sale unlawful; also the finding that the deceased was not guilty of contributory negligence.—Getz v. Standard Oil Co., Minn., 210 N. W. 78.

41. **Frauds, Statute of**—Consideration for Note.—A bank held a promissory note against Tibbits and another, which it sold and transferred to plaintiffs without recourse. At the same time and as a part of the same transaction two officers (including defendant) executed and delivered to plaintiff a written guaranty of the payment of the note in which no reference is made to consideration, and defendant invokes the statute of frauds. Held, that: (1) It is sufficient if the consideration appears by necessary implication. (2) The note and guaranty are to be construed together as one instrument. (3) The consideration involved is the consideration which passed from the plaintiffs to the bank contemporaneously with the delivery of the guaranty. (4) The qualified indorsement transferring the note to plaintiffs imports a consideration. This meets the requirements of the statute of frauds.—Hall v. Oleson, Minn., 210 N. W. 84.

42.——Part Performance.—Where plaintiff and decedent orally agreed to marry and that on death of either survivor should become owner of all their property, their subsequent marriage was not part performance taking agreement out of statute (Civ. Code 1913, par. 3272, subds. 3, 8).—Brought v. Howard, Ariz., 249 Pac. 76.

43. **Good Will**—Soliciting Old Customers.—Seller of ice business, including good will, cannot impair good will by soliciting business of old customers before buyer has time to make them his own.—Suburban Ice Manufacturing & C. Storage Co. v. Mulvihill, Ohio, 153 N. E. 204.

44. **Husband and Wife**—Gift.—Presumption that transfer of stock from husband to wife was gift held rebutted, where wife immediately executed blank transfer power of attorney, printed on reverse of certificates, and redelivered them to husband, and made declarations plainly showing she had not acquired beneficial ownership.—In re Raub's Estate, Pa., 134 Atl. 451.

45.——Mortgage.—A mortgage executed by a married woman on her separate estate without her husband joining is ineffective as a lien, but equity will declare it a lien if it was given to secure a debt contracted by her on the credit of her estate.—Bennett v. Orchard, N. J., 134 Atl. 519.

46. **Infants**—Necessities.—Hay and corn used in carrying on minor's farming operations held not necessities as affecting minor's liability on note given therefor.—O'Donniley v. Kinley, Mo., 286 S. W. 140.

47. **Injunction**—Notice to Client.—Where temporary restraining order was served on defendant, and copy of permanent injunction order was served on her attorneys, she was punishable for contempt for violating order, notwithstanding order making injunction permanent and order of affirmance were not served on her personally.—United States v. Sumner, N. Y., 217 N. Y. S. 645.

48.——Strikes.—Parades of 75 to 450 strikers led by band on road in morning when men were going to work and intended to induce them not to work held unlawful, as constituting coercion, and properly enjoined.—Jefferson & Indiana Coal Co. v. Marks, Pa., 134 Atl. 430.

49. **Insurance**—Change of Ownership.—Change of ownership of interest in automobile by award thereof to insured's wife in divorce decree avoids the policy.—Coffin v. Northwestern Mut. Fire Ass'n, Idaho, 249 Pac. 89.

50.——Fidelity Bond.—As respects indemnity insurance, where property was intrusted to a business manager, who was to account therefor and return property in his possession at end of the term, less interest and increment, his relation to his employer was one of trust based on contract.—United States Fidelity & Guaranty Co. v. Kinneman, Ohio, 153 N. E. 261.

51.——Larceny of Automobile.—Taking of corporation's automobile by gardener, employed by principal stockholder's wife, for his own purposes intending to return it, though wrongful, held not "theft" within automobile theft policy, though larceny within Penal Law, § 1293-a, as amended by Laws 1922, c. 500.—Schenectady Varnish Co. v. Automobile Ins. Co., N. Y., 217 N. Y. S. 504.

52.——Latent Disease.—In suit on life policy with defense of failure to fully disclose ailments, statement by insured after issuance of policy, that he had previously suffered from night sweats held properly excluded as too uncertain and indefinite to show characteristic symptoms of tuberculosis existing prior to application for insurance.—Livingood v. New York Life Ins. Co., Pa., 134 Atl. 474.

53.——Mistake in Answers.—Mistake in answers to questions as to health and prior medical attendance of insured in policy making answers representations and not warranties does not work forfeiture of rights under policy in absence of fraud.—Livingood v. New York Life Ins. Co., Pa., 134 Atl. 474.

54.——Reformation.—That while equity, as a general rule, will not extend relief to one who, through his own negligence, has sustained injury, yet a different rule applies to insurance contracts where the agent, in preparing the application, is the cause of the injury.—Central State Bank v. Royal Indemnity Co., Minn., 210 N. W. 67.

55. **Interstate Commerce**—Delivery to Military Reservation.—Transactions whereby oil company sold gasoline to the United States to be delivered on its military station, in the state, and shipped it from its refinery in the state, did not constitute sales in interstate commerce, so as to make the gasoline occupation tax, imposed by Acts 38th Leg. (1923) 3d Called Sess. c. 5 (Vernon's Ann. Civ. St. 1925, art. 7065), as applied to such sales, a burden on interstate commerce; the ceding by the state to the United States of jurisdiction over such tract pursuant to Const. U. S. art. 1, § 8, subd. 17, not constituting it "territory" foreign to the state, in the sense necessary for interstate commerce, as indicated by Interstate Commerce Act, § 1.—Grayburg Oil Co. v. State, Tex., 286 S. W. 489.

56. **Intoxicating Liquors**—Unlawful Importation.—One bringing whisky into country, which was found in his automobile by customs officer, as soon as he landed from international ferry, was not guilty of concealing and transporting whisky unlawfully imported.—Kurczak v. United States, U. S. C. C. A., 14 F. (2d) 109.

57. **Joint Adventures**—Contract by State Fair.—Contract by state fair of Texas with another for presenting pageant at his own expense for percentage of gate receipts held not to constitute joint adventure that would render fair liable to third parties on debts incurred by such other party.—McDaniel v. State Fair, Tex., 286 S. W. 513.

58. **Landlord and Tenant**—Option to Purchase.—Option, in lease of house by street and number, "to purchase the within property," does not entitle lessee to deed by metes and bounds, with right of way over adjoining land.—Williams v. Raab, N. J., 134 Atl. 337.

59. **Licenses**—Bond Issue.—Whether given corporate bond issues do not constitute "securities" within Gen. Code, § 6373-1, so as to bring sale thereof within exception from requirement of section 6373-2 that seller be licensed, cannot be determined by characteristics of bonds at any one time, and sale of less than 50 per cent of bond issue to one person was not within exception.—State v. Stockman, Ohio, 153 N. E. 250.

60. **Master and Servant**—Act of Manager.—Corporation, whose plant manager terminated agency and continued to operate plant under claim of ownership, is not responsible, under maxim respondeat superior, for his tortious act resulting in injuries to employee.—State v. Cox, Mo., 286 S. W. 368.

61.——Assisting Sheriff.—One compelled by sheriff to perform service of deputy sheriff, under Pen. Code, § 150, in assisting sheriff to make arrest, was employee in service of employer, within Workmen's Compensation, Insurance and Safety Act 1917, § 7 and section 8, subds. (a) and (b), being St. 1917, p. 835, when killed by one sought to be arrested.—Monterey County v. Rader, Cal., 248 Pac. 912.

62.——Assumption of Risk.—Under Federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), employee assumes risk ordinarily incident to employment or occasioned by employer's negligence if known to employee or plainly observable.—Heath v. St. Louis-San Francisco Ry. Co., Mo., 286 S. W. 148.

63.——Contributory Negligence. — If a servant continues to work in a dangerous place after knowing its danger, he is not guilty of contributory negligence as a matter of law, since he may rely on promise to repair, unless danger be so imminent that ordinarily prudent person would not continue.—Culver v. Minden Coal Co., Mo., 286 S. W. 745.

64.——Employer's Negligence.—Where, in hauling truck, a rope was attached to axle of another truck 50 feet from its end, unused part of rope being thrown into latter truck, and rope became untied, and portion in truck caught and injured leg of employee, held, employer's negligence as to tying rope and throwing unusued part into truck was for jury.—Watson v. Energy Const. Co., Mo., 286 S. W. 715.

65.——Safe Transportation. — Where contractor took employees to and from work by truck, employee returning from work was within scope of employment, and contractor was bound to exercise reasonable care to furnish reasonably safe transportation.—Watson v. Energy Const. Co., Mo., 286 S. W. 715.

66.——Student Fireman.—Student fireman, performing assigned duties under direction of engineer and fireman held an "employee" within federal Employers' Liability Act, amended by Act Cong. April 5, 1910 (U. S. Comp. St. §§ 8657-8665), and not mere licensee, although he received no pay.—Brown v. Chicago, R. I. & P. Ry. Co., Mo., 286 S. W. 45.

67. **Mortgages**—Foreclosure.—Where, in foreclosure of deed of trust, land was not sold by foot or acre, and there was no knowing misrepresentation or fraud, purchaser, failing to make calculations to determine if amount of land was as advertised in reliance on deed of trust, or to require covenants for his protection, took subject to rule of caveat emptor.—Buckman v. Bragaw, N. C., 134 S. E. 422.

68.——Sale of Railroad Property.—Under railroad mortgage providing, inter alia, that the proceeds of any sale of property should be expended by the trustee upon the request of the railroad company either in the purchase of other property, otherwise for the benefit of the "mortgaged property," or in the purchase of secured bonds, where property on which the mortgage was a first lien was sold as no longer needed for railroad purposes, and the trustee received the proceeds, held that the railroad company was entitled, to have a part expended in improvement of lines on which there was a prior mortgage which would add to the value and efficiency of the system as a whole; there being a large equity of redemption in the property covered by the prior mortgage.—Norfolk Southern R. Co. v. Guaranty Trust Co., U. S. C. C. A., 13 F. (2d) 979.

69. **Municipal Corporations** — Boundaries. — Where the description of municipal boundaries in an act of the Legislature (chapter 11724, Acts Special Session 1925) contains superfluous words, which describe a dead end line running out at right angles from the boundary, inclosing nothing, and the description is otherwise definite and complete, describing a definite area which is completely inclosed by an unbroken boundary line, such superfluous words describing such dead end line will be treated as harmless surplusage, and their presence in the act will not be permitted to defeat the legislative intent or affect its validity.—State v. City of Sarasota, Fla., 109 So. 473.

70.——Depression in Street.—Evidence that pedestrian slipped on ice filling saucer-shaped depression in pavement held not to show defect for which city was liable.—Boudreau v. City of Springfield, Ohio, 153 N. E. 264.

71.——Engineering Work by City Officer.—City's agreement to pay for specified engineering work 7 per cent of cost of street improvements held not void on ground that engineer was city officer, interested to such extent in contract, trustees' minutes and contract clearly showing that he was employee, appointed pursuant to Improvement Act 1911 (St. 1911, p. 751), § 41, though referred to as "city engineer."—Kennedy v. City of Gustine, Cal., 248 Pac. 910.

72.——Vacating Street.—Gas company held not entitled to enjoin vacation of street in which its pipes were laid in view of its right to damages and review by appeal.—Titusville Amusement Co. v. Titusville Iron Works Co., Pa., 134 Atl. 481.

73.——Wading Pool.—Wading pool in public park of varying depth of from 29 inches to 3 feet held not so essentially dangerous as would warrant holding municipality liable.—Vanderford v. City of Houston, Tex., 286 S. W. 568.

74.——Zoning Ordinance.—Zoning ordinance, providing that when front walls of 80 per cent of all buildings in residential district on one side of a street between two intersecting streets have been kept back from the street line, no buildings shall thereafter be set nearer the street line than distance established by majority of 80 per cent when ordinance was passed held not sustainable as valid exercise of police power, especially as it does not bear alike on all persons living within same territory.—Appeal of White, Pa., 134 Atl. 409.

75.——Zoning Ordinance.—Since property rights cannot be taken or impaired without due process of law, notice of proceedings of board of appeals to vary zoning ordinance, which seriously affects property rights, must be given to interested parties before board's decision is binding on them.—In re Cobb, N. Y., 217 N. Y. S. 593.

76. **Negligence**—Structural Steel.—Person designing and furnishing structural iron and steel for building, after its completion and acceptance by owner, is not liable to third person injured by its collapse.—Ford v. Sturgis, U. S. C. C. A., 14 F. (2d) 253.

77. **Parent and Child**—Charge Against Estate.—Legal obligation of father to support and educate his children during minority does not survive his death, and he may disinherit children by will.—Rice v. Andrews, N. Y., 217 N. Y. S. 528.

78. **Partnership** — Dissolution. — Dissolution is worked by death of partner, though partnership agreement provides if one of the partners dies his children shall have privilege of taking over his partnership interest, and that the other agrees to enter into partnership with them.—Pater v. Schumaker, Ohio, 153 N. E. 230.

79. **Principal and Surety**—Waiver of Performance.—Condition in contractor's bond, providing that no action shall be maintained thereon unless brought within specified time, held condition precedent to action on bond, compliance with which must be alleged in complaint, or, if plaintiff expects to prove waiver of performance, it must plead facts constituting waiver.—Town of Potsdam v. Aetna Casualty & Surety Co., N. Y., 217 N. Y. S. 641.

80. **Railroads**—Concurrent Negligence.—Collision of train with team at crossing, where cars were standing on two other tracks held clearly one of concurrent negligence, so that last clear chance doctrine does not apply.—Wheelock v. Clay, U. S. C. C. A., 13 F. (2d) 972.

81.——Track as Playground.—User of railroad tracks held to bring case within rule that if children had been playing in and around standing cars in switch yard so continuously and for such time that railroad employees should have known thereof, there is imposed duty of keeping a reasonable lookout for them.—Stergon v. St. Louis-San Francisco Ry. Co., Mo., 286 S. W. 720.

82. **Sales**—Latent Defects.—Under contract for manufacture and sale of castings, providing that castings which after test and acceptance showed injurious defects would be rejected, there was warranty as to latent defects, which survived acceptance.—Chesapeake & O. Ry. Co. v. Pittsburgh Steel Foundry Co., Ohio, 153 N. E. 201.

83.——Repudiating Contract. — Where machine was practically completed at time of attempted repudiation of contract by buyer, rule of damage requiring proof of expense, labor, and material put into machine after receipt of notice of repudiation before entitling seller to recover therefor under Sales Act May 19, 1915, § 64, subd. 4 (P. L. 543; Pa. St. 1920, § 19712), held not applicable.—Mattison Mach. Works v. Nypenn Furniture Co., Pa., 134 Atl. 459.

84. **Subrogation**—Mortgage. — A purchaser of property who has discharged an incumbrance thereon will be subrogated to the lien of such incumbrance as against the holders of other incumbrances of which he had no notice, but not as against the holders of other incumbrances of which he had notice, either actual or constructive.—Benenson v. Evans, Ga., 134 S. E. 441.

85. **Taxation**—Inheritance Tax.—Voluntary payment of inheritance tax without protest or objection cannot be recovered back, even though it was illegally assessed.—Executors of Long's Estate v. State, Ohio, 153 N. E. 225.

86.——Notice of Time for Hearing Complaints.—Board of equalization, by publishing on September 10, in weekly issue of local newspaper notice of time for hearing complaints, erroneously designating date as September 21, and on September 16 notice correctly designating date as September 22, fulfilled duty to give reasonable notice.—Hart v. Board of Com'rs, N. C., 134 S. E. 403.

87.——Taxicabs.—That Act Pa. June 1, 1889, § 14 (P. L. 426), and section 23 (P. L. 431; Pa. St. 1920, § 20388), impose a gross receipts tax on corporations operating taxicabs and not on individuals held not to violate Const. U. S. Amend. 14, § 1.—Commonwealth v. Quaker City Cab Co., Pa., 134 Atl. 404.

88. **Theaters and Shows**—Not "Church."—That religious services are conducted in building used for maternity hospital held insufficient to classify property as a "church," within meaning of ordinance providing that permit to operate theater within 300 feet of church may be refused.—Salvation Army v. Frankenstein, Ohio, 153 N. E. 277.

89. **Trusts**—Sale of Lands.—Where the terms of a duly recorded trust deed require the trustee to sell lands when directed to do so in writing signed by the beneficiaries and duly acknowledged for record, a contract to sell the land, made by the trustee at the special instance and request and under the express direction of the beneficiaries, will not be specifically enforced in equity, when the trustee was not so directed to sell by a writing signed by the beneficiaries and duly acknowledged for record, even though the beneficiaries created the trust.—King v. Palm Beach Bank & Trust Co., Fla., 109 So. 580.

90. **Vendor and Purchaser**—Claim for Damages. —Purchaser waived claim for damages suffered from inability to secure loan for which he had arranged because of defect in vendor's title at time latter contracted to convey by entering into new contract whereby his time for making a payment and receiving deed was extended.—Gamet v. Allender, S. D., 210 N. W. 49.

91. **Wills** — "Legitimate Children." — Children born out of wedlock and legitimated according to laws of Nevada (Rev. Laws, § 5833), where parents and child resided held within class of children designated in will as persons to whom father might make valid appointment; "children," as used in will, meaning legitimate children.—Holloway v. Safe Deposit & Trust Co., Md., 134 Atl. 497.

92.——Perpetuities.—Will creating separate trusts for each of testatrix's surviving children, corpus to be delivered free of trust to each child reaching 30 years, share of any child dying without issue before 30 to be divided equally and added to shares of testatrix's children then surviving, held valid, and not violative of statute against perpetuities, notwithstanding retention of share of deceased child for secondary lives of two surviving children.—In re Von Bernuth's Estate, N. Y. 217 N. Y. S. 633.

93.——Signature.—Where signature to will is by mark of testatrix, it is presumed, in contest of will, in absence of contrary showing, that signature was made by express direction and mark inserted by testatrix.—Aston v. Hauck, Ohio, 153 N. E. 277.

94.——Specific Legacy.—Gift to hospital of proceeds of certan property to be sold at death of life tenant held specific legacy, which, having failed, under Act June 7, 1917, § 6 (P. L. 403; Pa. St. 1920, § 8312), passed as such under clause disposing of lapsed legacies and devises, and did not pro rate with general legacies or abate because of lack of assets to pay them.—Moore v. Gilbert, Pa., 134 Atl. 462.

95. **Witnesses**—"Third Degree."—Witnesses are under protection of judge, and methods used by examining counsel which partake of method of "third degree" or "rack" or "inquisition" should be promptly stopped, that men on trial may obtain justice by due process and fair trial.—Jones v. State, Ala., 109 So. 564.

96. **Words and Phrases**—"Market Value." — "Market value" of personal property has been defined as price established by public sales in business, or prices dealers are willing to receive and purchasers are made to pay, when goods are bought and sold in ordinary course of trade.—Commander v. Smith, N. C., 134 S. E. 412.

97. **Workmen's Compensation**—Course of Business.—Defendant and the ice company at, the time the employee was injured, were engaged in the due course of business in the accomplishment of related purposes on the premises within the purview of subdivision 1, § 4291, Gen. St. 1923, and employee's exclusive remedy is under the Workmen's Compensation Act.—Rasmussen v. George Benz & Sons, Minn., 210 N. W. 75.

98.——Course of Employment.—Where it was no part of duty owed to employer by employee as shop carpenter to use automobile to reach his work, injury to latter while parking it in building on owner's premises before beginning his day's work held not to arise in course of employment, nor incidental thereto.—Savage's Case, Mass., 153 N. E. 257.

99.——Course of Employment.—Injuries to employees while being carried to and from work in conveyance provided by employer, pursuant to contract of employment held received in "course of employment."—Vogel's Case, Mass., 153 N. E. 175.

100.——Infection of Cold Sore.—Infection of cold sore, caused by rubbing face with hands while handling carbon paper held "injury" within Workmen's Compensation Law.—Jasionowski v. Industrial Commission, Ohio, 153 N. E. 247.

101.——Injury "by Accident."—Workman receives injury "by accident," within C. S. § 6217, so as to be entitled to compensation; it being unexpected and unintentional, though coming on gradually as the cumulative effect of the continuous pressing of his knee against the shift lever of truck driven by him—necessary because of worn gears for travel at high speed—and the repeated striking of the knee by the lever when the cogs would slip out of mesh.—Aldrich v. Dole, Idaho, 249 Pac. 87.

102.——Loss of Eye.—Under Employers' Liability Law Alaska, employee who lost eye in course of employment, having previously lost sight of his other eye held entitled to recover as for total disability.—Killisnoo Packing Co. v. Scott, U. S. C. C. A., 14 F. (2d) 86.

Index-Digest

To the Editorials, Notes of Recent Decisions, Leading Articles, Annotated Cases, Legal News, Correspondence and Book Reviews in Vol. 99

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Subject-Index

To All the "Digests of Current Opinions" in Vol. 99

This Subject-Index contains a reference under its appropriate head to every Digest of Current Opinions which has appeared in the volume. There are no cross-references, but each Digest is indexed herein under that head for which it would most naturally occur to a searcher to look. The page to which reference is made may contain more than one case on the subject under examination, and to make a thorough search it will be necessary to scan each case listed under the subject heading.